Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Biennial Regulatory Review of Regulations	)	WC Docket No. 02-313
Administered by the Wireline Competition	)	
Bureau	)	

REPLY COMMENTS OF COVAD COMMUNICATIONS

Covad Communications, by its attorney, herewith respectfully submits its reply comments in response to the Commission's Notice of Proposed Rulemaking seeking comment on modifications to the Commission's rules administered by the Wireline Competition Bureau as part of the Commission's Biennial Regulatory Review process.[1] In its initial comments, Covad addressed the Commission's requests for comments on its network change notice rules, specifically as they apply to the deployment of fiber strands in the local loops of incumbent local exchange networks. Covad's initial comments supported the Commission's proposed rule changes to section 51.329(c)(1), and sought specific clarifications of the Commission's existing network change rules.[2] Covad respectfully submits these reply comments to address briefly some of the arguments made by ILEC commenters in their initial comments. Specifically, for the reasons set forth below, Covad believes that the Commission should reject the ILECs' calls for broad, sweeping changes to its unbundling and UNE pricing rules as part of this Biennial Review proceeding.

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[1] *See Biennial Regulatory Review of Regulations Administered by the Wireline Competition Bureau,* WC Docket No. 02-313, Notice of Proposed Rulemaking, FCC 03-337 (rel. Jan. 12, 2004) (*NPRM*).

[2] *See* Covad Comments in WC 02-313, filed April 19, 2004.

I. The Biennial Review is an Inappropriate Forum to Address the Rule Changes Sought By ILEC Commenters

In one form or another, Verizon and USTA both call for sweeping changes to the substance and enforcement of rules governing broadband, unbundling of network elements, UNE pricing, and section 271 – all issues which, as the ILECs acknowledge, are currently being examined and addressed by the Commission in other pending dockets.[3] There is little doubt that the positions taken by these parties in their comments are essentially the same as the positions they have taken in the Commission's corresponding dockets examining changes to broadband regulatory classifications, unbundling, TELRIC and forbearance from section 271.[4] Certainly, the ILECs are free to reiterate their positions from other proceedings as many times and in as many forums as they like. What Covad objects to, however, is the implication that the Commission's Biennial Review proceeding somehow operates under an independent legal standard that compels the Commission to take the actions that Verizon and USTA have, so far unsuccessfully, sought from the Commission in the respective individual proceedings still continuing to actually address these issues.

As Verizon and USTA should well know, this argument was conclusively addressed and rejected by the U.S. Court of Appeals for the D.C. Circuit. In *Cellco*

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[3] *See* Verizon Comments at 10-33; *and* Attachments to USTA Comments (USTA Comments in WC Docket No. 02-313, filed Oct. 18, 2002 and Nov. 4, 2002).

[4] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* WC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd 3019, 3047, para. 61 (2002) (*Broadband NPRM*); *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173, FCC 03-224 (rel. Sept. 15, 2003) (*TELRIC NPRM*); *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, Public Notice, CC Docket No. 01-338, FCC 03-263 (rel. Oct. 27, 2003).

Partnership v. FCC,[5] the last time Verizon raised this argument, the D.C. Circuit made clear that section 11(a) of the 1996 Act simply reiterates the same general public interest standard contained throughout the rest of the Act, most saliently in section 201(b). As the D.C. Circuit stated,

> Interpreting the term "necessary" in § 11 in this manner avoids the inconsistent application in related contexts of identical terms used by Congress. Applying the same "necessary in the public interest" standard as in § 201(b) is consistent with both of the qualifying terms ("no longer necessary" and "as the result of meaningful economic competition") that Congress added in § 11 and avoids absurd results where a rule is "necessary" when adopted but not when it is subjected shortly thereafter to biennial review under § 11.[6]

Thus, the Commission's Biennial Review process does not compel the rule changes that they have, to date unsuccessfully, sought from the Commission in other pending proceedings. Rather, as *Cellco* makes clear, what is required of the Commission is exactly the very process it has undertaken – namely, the review of wireline regulations contained in its 2002 Biennial Regulatory Review Staff Report,[7] followed by the current NPRM to seek comment on whether the rules identified in the staff report remain necessary in the public interest.[8] Furthermore, as Verizon and USTA know, a fundamental predicate for the relief they seek in their comments is lacking here. Specifically, in its 2002 Biennial Regulatory Review Staff Report, Commission staff did not identify any of the broadly sweeping rule changes sought by the ILEC petitioners as appropriate candidates for elimination or revision during the Biennial Review process. Furthermore, the broadly sweeping rule changes Verizon and USTA seek were not

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[5] 357 F.3d 88 (D.C. Cir., Feb. 13, 2004).

[6] *See Cellco,* 357 F.3d at 98.

[7] *See Wireline Competition Bureau, Federal Communications Commission, Biennial Regulatory Review 2002*, WC Docket No. 02-313, GC Docket No. 02-390, Staff Report, DA 03-804 (2002).

[8] *See Cellco*, 357 F.3d at 100-01.

included in the Commission's instant notice of proposed rulemaking, without which a proper record under the Administrative Procedures Act cannot be generated. Thus, the rule changes sought by the Verizon and USTA simply cannot legally be incorporated into the Commission's 2002 Biennial Review process at this juncture.

II. Contrary to ILEC Assertions, the Commission's Unbundling Rules Continue to Be "Necessary in the Public Interest"

As Covad has made clear in its comments in the various proceedings Verizon and USTA seek to incorporate into this one, the Commission's rules governing the classification of wireline broadband services, the regulation of incumbent LEC broadband services, the TELRIC pricing of unbundled network elements, and the unbundling of broadband facilities continue to remain "necessary in the public interest." Thus, as a substantive matter, the arguments of Verizon and USTA are wrong on the merits – as evidenced by their lack of success, to date, in obtaining from the Commission in various proceedings the relief they seek here. Rather than reiterate its arguments for why these rules remain "necessary in the public interest," however, Covad here incorporates by reference its comments, reply comments, and opposition submitted in these various proceedings.[9] As Covad's previous filings make clear, the rules Verizon and USTA seek to eliminate in one fell swoop here remain vital safeguards of the public interest, by promoting consumer choice, competitive pricing, and innovation in the provision of competitive broadband telecommunications services.

III. Conclusion

[9] *See, e.g.,* Covad Comments, Reply Comments and Opposition in WC Docket Nos. 01-338, 01-337, 02-33, 03-173.

For the forgoing reasons, Covad respectfully requests that the Commission reject Verizon's and USTA's calls for broadly sweeping changes to its unbundling and UNE pricing rules. These issues are more appropriately addressed in the various pending proceedings actually addressing these specific issues. Moreover, these issues were not identified by Commission staff during the course of the Biennial Review process as candidates for revision or elimination, and were not included in the Commission's instant notice. Accordingly, they cannot as a legal matter become incorporated at this juncture into the 2002 Biennial Review process.

Respectfully submitted,

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